

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chair  
Dr. Sue H. Abreu  
Dr. Arielle J. Miller

In the Matter of  
DUKE ENERGY CAROLINAS, LLC  
(Oconee Nuclear Station, Units 1, 2, and 3)

Docket Nos. 50–269-SLR-2, 50–270-SLR-2, and 50–287-SLR-2

ASLBP No. 24-985-03-SLR-BD01

August 6, 2024

MEMORANDUM  
(Status of Proceeding Relative to  
Potential Nonpublic Information)

As reflected in a series of participant filings and Licensing Board issuances over the past six weeks,<sup>1</sup> an issue has arisen in this 10 C.F.R. Part 54 proceeding regarding the subsequent renewal of the Part 50 operating licenses for the Oconee Nuclear Station, Units 1, 2, and 3 (ONS) concerning the existence of possibly nonpublic information associated

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<sup>1</sup> See Licensing Board Memorandum and Order (Regarding Status of Initial Prehearing Conference Transcript) (June 28, 2024) (unpublished); NRC Staff Response to June 28, 2024, Memorandum and Order (July 3, 2024); Licensing Board Memorandum and Order (Regarding NRC Staff Review of Initial Prehearing Conference Transcript) (July 8, 2024) (unpublished) [hereinafter Board Order Regarding Initial Prehearing Conference Transcript]; Joint Motion for Proposed Protective Order Governing Disclosure of Sensitive Unclassified Non-Safeguards Information and Non-Disclosure Declaration (July 24, 2024) [hereinafter Protective Order Motion]; Licensing Board Memorandum and Order (Regarding Objection to Motion for Entry of a Protective Order) (July 25, 2024) (unpublished) [hereinafter Board Protective Order Objection Issuance]; Response by Beyond Nuclear and Sierra Club to Joint Motion for Protective Order (July 29, 2024) [hereinafter Petitioners Protective Order Response].

with the proceeding.<sup>2</sup> This culminated in a July 30, 2024 public prehearing conference with counsel for the Nuclear Regulatory Commission (NRC) Staff, applicant Duke Energy Carolinas, LLC (Duke), and petitioners Beyond Nuclear, Inc., and the Sierra Club, Inc., (collectively Petitioners) that provided the participants with an opportunity to make presentations to the Board regarding a pending July 24, 2024 NRC Staff motion, in which Duke joined, seeking entry of a proposed protective order and Petitioners' July 29, 2024 response opposing that motion. See Tr. at 156–58 (Bollwerk).

During that conference, the NRC Staff indicated that the next day the Federal Energy Regulatory Commission (FERC), with which the Staff has been consulting regarding the potential nonpublic status of the June 24, 2024 initial prehearing conference transcript,<sup>3</sup> would be providing more information regarding that consultation process. See Tr. at 180–81 (Woods). Further, the NRC Staff indicated that by August 2, 2024, it would submit for the public record another status report concerning FERC's document review. See Tr. at 189, 246 (Woods, Bollwerk). And in that August 2 status report, the Staff stated that it had conferred with FERC on August 1-2, 2024, and that it now expected to receive additional information such that it could provide another status report on the consultation process on August 8, 2024. See NRC

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<sup>2</sup> The information involved appears to be Critical Energy/Electric Infrastructure Information (CEII), which is a category of Sensitive Unclassified Non-Safeguards Information (SUNSI) that pursuant to 10 C.F.R. 2.390 is treated as nonpublic information. See Protective Order Motion, attach. 1, at 1 ([Proposed] Protective Order).

<sup>3</sup> Under an existing NRC/FERC memorandum of understanding (MOU), if the NRC identifies potential CEII, it may consult with FERC to obtain a supporting determination that the information in question is CEII. See [MOU] between [NRC] and [FERC] Regarding the Treatment of [CEII] ¶ C (June 2018) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18164A182); see also Third Addendum to [MOU] Between [NRC] and [FERC] Regarding the Treatment of [CEII] (April 2024) (extending term of 2018 MOU for an additional two years) (ADAMS Accession No. ML24099A224). Under existing regulatory provisions, a federal agency may seek a CEII designation consultation with FERC. See 18 C.F.R. § 388.113(a) (stating that any federal agency may take “all necessary steps” to protect information in its custody or control to ensure electric grid safety and security and that an agency may consult with FERC regarding the “treatment or designation” of such information); see also 16 U.S.C. § 824o-1(d)(3) (indicating “[i]nformation may be designated by [FERC] or the Secretary [of Energy]” as CEII).

Staff's Status Report Regarding Consultations Concerning the Withholding of Nonpublic Information from Disclosure (Aug. 2, 2024) at 1–2.

Also at the July 30 prehearing conference, the Staff explained that the genesis of this ongoing FERC consultation process was ONS-related information publicly released by the NRC as a result of a 2015 Freedom of Information Act (FOIA) request that had again come under scrutiny because of a 2022 FOIA request that resulted in a previously-released document being made nonpublic.<sup>4</sup> Thereafter, the scope of the NRC Staff's concern about the existence of potential nonpublic information in ONS-associated public documents expanded because of the Board-requested review of the June 24, 2024 initial prehearing conference transcript.<sup>5</sup> See Tr. at 180 (Woods). Moreover, as a consequence of that review, in addition to the June 24 initial prehearing conference transcript, the Staff apparently has found other, although as yet unidentified, documents that it considers relating to this proceeding that merit FERC review as possibly containing nonpublic information. See Tr. at 180, 188 (Woods).

The NRC Staff declared as well that for the Staff to provide any further information about this potential nonpublic information to the other participants, including possible document redactions, would require the entry of a protective order covering nonpublic information provided by the Staff to FERC for CEII review. See Tr. at 187, 190–92, 196, 199, 200–01 (Woods). Duke agreed. See Tr. at 193–94 (Lighty). Petitioners, on the other hand, maintained that no protective order was necessary and that the Board should simply await FERC's determinations regarding the presence of nonpublic information in any Staff-referred documents, which would

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<sup>4</sup> See Tr. at 179–80 (Woods); see also Board Protective Order Objection Issuance at 5 (outlining Board request for information at July 30, 2024 prehearing conference concerning removal of 2011 NRC safety evaluation from public availability in the agency's ADAMS document repository as described in Petitioners' May 1, 2024 corrected hearing request).

<sup>5</sup> In this regard, the Board was acting out of an abundance of caution given the Staff's previous indication that information associated with the issues being discussed during the initial prehearing conference might involve nonpublic information. See Tr. at 65–66 (Woods).

provide the Board and the participants with the information they need to understand the nonpublic information's scope relative to this proceeding.<sup>6</sup>

In its August 2, 2024 status report, the Staff acknowledged the additional burden that the need to treat information as nonpublic was creating for the Board and the other participants. See August 2, 2023 Staff Status Report at 1. The Board appreciates the Staff's acknowledgment in this regard. The Board has a duty to draft and issue a decision on Petitioners' hearing request that, to the maximum degree feasible, is based on information that is part of the public record. At the same time, the Board is faced with the possibility, as-yet largely undefined, of having to incorporate information necessary to ensure its decision sets forth an accurate and adequate explanation of the Board's determinations and reasoning that, because of security concerns, cannot be made part of the public record. At this juncture, trying to fulfill these arguably conflicting responsibilities places the Board in a somewhat challenging situation.

Because the only identified item potentially containing nonpublic information -- the June 24, 2024 initial prehearing conference transcript -- has been secured,<sup>7</sup> at this point the Board prefers to await the Staff's next status report before making any decision about whether to proceed with a protective order. And while it does so with the hope that the information provided by the Staff in its next status report will clarify the extent to which such an order is or is not appropriate in this proceeding, the Board also recognizes that the matter of the proper

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<sup>6</sup> See Tr. at 198–99 (Curran); see also Petitioners Protective Order Response at 13 (opposing entry of a protective order and urging the Board to postpone public issuance of the decision on Petitioners' hearing request until FERC informs the NRC Staff what information associated with this proceeding must be redacted).

<sup>7</sup> As the Board indicated in its issuance regarding the June 24 transcript, the transcript promptly was removed from the public portion of the agency's Electronic Hearing Docket; the agency's court reporting service was advised not to make the transcript available to anyone; and the participants were advised to treat the transcript as nonpublic, a request the Board has no reason to believe has not been honored by the participants. See Board Order Regarding Initial Prehearing Conference Transcript at 2–3.

treatment of nonpublic information may take some time to resolve, with whatever impacts that may have on the conduct of this proceeding.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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G. Paul Bollwerk, III, Chair  
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 6, 2024

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 ) 50-270 SLR-2  
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(Oconee Nuclear Station Units 1, 2, and 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM (Status of Proceeding Relative to Potential Nonpublic Information)** have been served upon the following persons by Electronic Information Exchange.

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**Duke Energy Carolinas, LLC (Oconee Nuclear Station Units 1, 2, and 3, Docket Nos. 50-269, 50-270, and 50-287 SLR-2)**  
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of August 2024.